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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES WILLIAM SMITH, Defendant and Appellant.	B153877 (Los Angeles County Super. Ct. No. MA021295)

Appeal from a judgment of the Superior Court of Los Angeles County. Gregg Marcus, Judge. Remanded in part, in all other respects affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General and William H. Davis, Jr., Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, appellant was convicted of two counts of corporal injury to cohabitant Doreen Hitchcock (Pen. Code, § 273.5, subd. (a)) and of making criminal threats (Pen. Code, § 422) as to the same victim. The jury found true allegations of infliction of great bodily injury (GBI) under circumstances involving domestic violence as to two counts (Pen. Code, § 12022.7, subd. (d) [*sic*, (e)]), but the jury but was unable to reach a verdict on two additional counts of corporal injury to Ms. Hitchcock.[1]

The trial court sentenced appellant to eleven years and eight months in prison.[2] We shall remand for consideration of the sentence imposed and shall otherwise affirm the judgment.

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[1] Appellant was convicted of counts one and two, corporal injury on or about August 21, 2000, and between June 4 and June 6, 2000. The jury found true allegations that appellant personally inflicted great bodily injury under circumstances involving domestic violence as to both of these counts. The criminal threats (count 5) were made between June 11 and August 21, 2000.

After the jury had reached verdicts on three counts, an alternate was drawn when one juror was excused for a previously planned event. The reconstituted jury could not reach a verdict as to counts three and four, which alleged corporal injury to spouse/cohabitant on and between June 1 and July 31, 2000 (count 3), and on and between August 10 and August 21, 2000 (count 4). The evidence as to those two counts was a punch on the cheek on two different occasions. Following sentencing, the People decided not to proceed on those counts, and the court dismissed them.

[2] The court selected the upper term of 4 years as to count one and added 5 years for the great bodily injury allegation. As to count 2, the court selected a consecutive term of one-third the mid-term of 3 years, or one year, and added 20 months pursuant to the great bodily injury allegation. The court selected a concurrent term of one-third the mid-term of 24 months, or 8 months, for count 5.

Appellant's motion to augment the record brings to our attention a letter from the Department of Corrections, which discovered an error in the trial court's sentencing in that concurrent terms, unlike consecutive terms, may not be imposed at one-third the midterm. We have augmented the record on appeal to include the superior court file. A minute order of March 11, 2002, reveals that the trial court, having received notice from the Department of Corrections, "reabstracted to reflect the following: As to count 5 the court selects the mid-term of . . . 24 months concurrent to counts one and two for a total of nine years in state prison." We cannot determine how the imposition of an increased

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant and Doreen Hitchcock met bowling and were soon living together. Both had substance abuse problems; at times she drank to excess, and he used drugs.[3] There is ample evidence that appellant viciously beat the victim, inflicting severe injuries including broken ribs and a distorted face. He also threatened to kill her slowly by cutting off a finger, an ear, etc. Financially independent when she met appellant, by the time she left the relationship, Ms. Hitchcock was unemployed and fled with only few belongings, leaving her furniture and possessions in the home they had shared. Appellant denied the charges and testified that Ms. Hitchcock fell down stairs, was beaten by someone else after leaving him, and/or brought injuries on herself when trying to disrupt his driving.

Incident of March 2000 (uncharged offense)

This incident was referred to only in passing in the People's case. The court ruled that the testimony of defense witness Crystal Ducharme opened the door to other incidents between appellant and Hitchcock. Knowing that the March incident would be admitted in rebuttal, appellant in defense explained his version of the incident as one where Doreen Hitchcock unexpectedly came in and grabbed and shook him from a sound sleep; she was screaming and asking why the plumbing in the bathroom was not working. He pushed her off and she fell backwards and hit her head on the wall; she pushed him and he hit his head. He left the house to get money for a trip to Mammoth with his son and Doreen, and Doreen jumped on the hood of the car. When he returned from the bank

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concurrent term of 24 months as to count 5 reduced the total years in prison from 11 years 8 months to the 9 years noted in the minute order of March 11, 2002. Therefore, we shall remand for resentencing so that counsel and the trial court may further consider that matter.

[3] He testified to daily use of methamphetamine after his wife passed away in June 1999 and the daily use of drugs during the year his wife was dying.

police arrested him for cohabitant abuse; he bailed out the next day, and they all went to Mammoth.[4] He was supposed to go to some domestic violence classes, but did not.

Doreen Hitchcock disputed appellant's version of the March 2000 incident in her rebuttal testimony. She left for work at MGM that day after showering and found no problem with the plumbing. When she called home about 10:30 or 10:45, appellant's son answered the phone; he was hungry, was not at school as he should have been, and said that his father was sleeping. Hitchcock, who was very fond of the boy and worried about his welfare, called appellant's cousin Michelle, who agreed to pick up the boy.

Hitchcock was very angry at appellant for leaving the boy hungry and not getting him to school in the morning. She drove home on her lunch hour and went to wake up appellant; he was very angry that she shook him and woke him out of a sound sleep and, for the first time, appellant hit her. He started screaming and told her never to wake him up out of a sound sleep; he slugged the side of her face, hitting her a couple of times, including in the eye where she was wearing a hard contact lens. He also pushed her into the closed door.

Injured, Hitchcock called work to report she had an altercation at home and would not be back that day; she spoke to co-worker Sharon Booker and then to her supervisor who said they would call the police if she did not. Hitchcock then called the police, who arrived quickly. She believes appellant was arrested. Photographs taken about an hour after the incident show her swollen lip and bruising in the cheek and chin areas, bruising which she testified was worse than the photographs depict.[5]

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[4] Appellant does not believe he mentioned to the police that he pushed her twice inside the house. He told the officer they had a mutual fight and she ran after the car and fell down.

[5] An officer who arrived at the scene found her crying, nervous, and "[b]orderline hysterical really." There was redness on her right cheek area and scratches and redness around her neck, chin and chest area.

The officer obtained an emergency protective order and was leaving when appellant drove by the house; appellant had no injuries. Appellant's story to the officer

She did not want to get appellant in trouble and recanted her story in a hearing, saying she had fallen. Appellant was very angry with her for calling the police, but she did go with him to Mammoth.

Sharon Booker testified that Hitchcock received phone calls from appellant's young son that morning; Hitchcock was concerned about his not eating and that appellant was not up to help him. After Doreen Hitchcock went home for her lunch hour, she called and said appellant hit her and beat her up and that she was scared and did not know what to do; Booker told her to call the police. Hitchcock called back a few minutes later and talked to a supervisor. When Booker saw her the next day, Hitchcock had a bruised face and black and bloodshot eye. The incident affected Hitchcock's work performance and she stopped working there a month or two later, a termination Booker did not think was related to any alcohol use but to decreased work performance affected by Hitchcock's personal life.

Infliction of GBI involving domestic violence between June 4 and June 6, 2000 (count 2)

Appellant was "very strong," about 5'6" and 175 pounds. Ms. Hitchcock, 5'10" and 115 pounds at trial, weighed about 127 pounds when they met. Appellant admitted being considerable stronger than Hitchcock, described by appellant as a "weak person" and by another witness as "very frail and skinny."

During the months after she moved in with appellant, he became increasingly domineering, critical of her housekeeping, and flamboyant about his affairs with other women, including defense witness Crystal Ducharme, who lived in a shed in his backyard while her fiancé was in prison. Appellant's use of drugs, already heavy, escalated after his young son moved out of the house and in with his aunt.

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was that the victim began hitting him in the back and head while he was sleeping; she was yelling that the plumbing was not working. Appellant said she pushed him and caused him to fall down and strike his head on the back of the wall; he then got dressed and left. Appellant did not say he had pushed the victim causing her to fall, that he struck her a second time, or that he saw her get hurt in any way.

Appellant and Hitchcock had a very bad argument and got into a physical brawl. He threw her in the corner of the living room, held her arms down, and started beating on her ribs, refusing her plea to stop and telling her "You're not going to talk to me like that." She was in great pain and had trouble breathing.

A few days later, she asked appellant to take her to the doctor. He first refused; but he took her after she, experiencing excruciating pain, called and made an appointment. She did not want appellant to get in trouble so told the nurse that she fell down the stairs. There were no injuries to her wrists, elbows, or knees.

According to Dr. Neils Jorgensen, given her injuries, the explanation of falling down stairs was an "anatomic absurdity." In addition, there was only one stair, not a set of steps, at the house.

Appellant denied the rib punching incident on June 4. His version was that Hitchcock was upset about her mother's death on May 27 and her sister's failure to tell her that her mother had died. Although Hitchcock testified the incident with her sister sobered her up, appellant's version was that she was grieving for her mother and, drunk, fell down a stair in the back of the house, injuring her ribs. He denied punching her in the ribs area at any time.

Crystal Ducharme, whose credibility was suspect at best, portrayed Hitchcock as a belligerent drunk who was never sober. Ducharme denied seeing appellant hold down the victim and punch her in the ribs, testifying she saw Doreen fall and land on the cement and dirt.

After the June 4 incident but before the end of July 2000, appellant may have hit Ms. Hitchcock with his fist on the right side of her face. She testified she received a black eye and a black and blue chin and left him for about a week, going to live with a friend in the Little Rock/Palmdale area. Appellant denies that incident. The jury hung on that count.

Sometime about August 11, appellant got mad at her again and struck her on the right side of her face with his fist. Appellant denies striking her on that date. The jury hung as to that count.

Criminal threats between June 11 and August 31, 2000 (count 5)

On another occasion, the incident giving rise to count 5, appellant was in his bedroom and told Doreen Hitchcock he would kill her and would make her stay in pain for a long time. He would do it slowly, cutting off a finger here or an ear there to make her stay in pain. When she expressed disbelief that he meant that, appellant would not respond. She was afraid right after he made such statements, but she loved him and overlooked his behavior. Appellant denied any such threats, testifying he did have conversations about alcohol killing her.

Infliction of GBI involving domestic violence on August 21, 2000 (count 1)

Appellant and Hitchcock were going to drive to the Little Rock/Palmdale area to get some of the clothes she had left there but stopped at a drug store near DeSoto and Devonshire to pick up something to help Hitchcock's asthma. Appellant was very angry because she took a sip of alcohol while he was in the store; he hit her on the left side of her face with a closed fist. He just hauled off and punched her in the face.

At first unconscious, she remembered waking up half asleep out in Little Rock; she went in and out of consciousness. She found herself in the dirt in the desert. She believes appellant left her out in the desert but then picked her up and drove her home. However, appellant did not get her medical aid and told her to stay in his unairconditioned camper outside of the house when they returned home. Her face felt "big, swollen, [and] heavy."[6] By the next morning, the whole side of her face was

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[6] Appellant admits taking her to the camper unconscious in the middle of summer in Reseda rather than getting medical attention or taking her into the house. He did not check on her that day or the following day to see if she was dead or alive. Neither did he call the police when he found her missing from the camper.

swollen; her eye was closing up, and her mouth was bloody. He did not apologize for what he had done.

She took the two bags of clothes from the back of his vehicle and nothing else, leaving her furniture, appliances and everything else because "I didn't want to die." An unknown woman drove her to a convenience store and got her $20. A disheveled and dirty man saw her, asked what had happened, and told her he was going to call the police. The police, who observed her to be injured and crying, called an ambulance to take her to the hospital. She told the police appellant was her assailant but that she did not want to press charges; she told the police he hit her so hard that she passed out and that she was afraid of him. Very emotional, she also told the police about the rib incident and two other incidents when he punched her in the face and that she did not report the previous assault because of his threats that if she reported them he would kill her. According to Deputy Dunn, called by the defense, Hitchcock is the "classic example of what we call an abused person from a domestic situation."

Hitchcock was taken to Northridge Hospital and was treated there. She then stayed at a friend's home and on August 25 went to a domestic violence shelter. She has not had a drink since two days after leaving him.

Her injuries from this incident are severe. Her face has been pushed to the right, and her jaw and tongue are out of alignment, as is her septum. Police took photographs that show her injuries on August 22; photographs taken the next day show the progression of the injuries. Dr. Jorgensen reviewed the medical records and opined nerve damage and impaired mental acuity. Her face droops and her smile does not match. In Dr. Jorgensen's opinion, the injuries could not have been caused by a single blow to the face. That explanation was "[a]natomically not possible."

Regarding August 21, appellant testified he discovered Hitchcock had consumed the entire gift bottle he had purchased to take to Kathleen Bondsack in Palmdale and

drunkenly grabbed for the wheel of the car while pedestrians were nearby.[7] He then reached up to knock her hands off the steering wheel and hit her face and chin. He described it as just swatting her hands away with a "very small" amount of force; he later added that the left side of her face then hit the console. Appellant denies punching her in the face any other time. Hitchcock denies there was a gift bottle packaged for Kathleen; she admits taking a sip of an open bottle that was half gone, but denies the car was moving or that she grabbed at the wheel.

According to defense witness Crystal Ducharme, Hitchcock looked fine the day she left appellant. But when they drove over to see her two days later at the apartment of a "tall colored guy," Hitchcock had a black eye, and the side of her face was purple.

Defense character witnesses

Appellant's pastor testified as to appellant's reputation for being a nonviolent and honest person. However, he clearly did not know about appellant's daily drug use or allowing Crystal Ducharme into his home days after his wife died. He knew only of the incident in the car, where he was told appellant put out his arm to stop the woman from pulling on the wheel of the car. He did not know of any of the other alleged incidents, the rib fractures, or the level of injury in one of the photographs.

Similarly, the former secretary for his family's business testified as to appellant's "very good" reputation for honesty and nonviolence. She, too, did not know he used methamphetamine on a daily basis in the last two years but testified it would not change her opinion.

Finally, appellant's aunt, who had taken care of him as a child and who participates in raising appellant's son, testified he has a reputation as an honest and nonviolent person. She never saw him strike the victim, but twice saw the victim poke at appellant and kind of slap at him; if he did not respond, Hitchcock would take his cheeks

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[7] Crystal Ducharme testified appellant never told her he punched Doreen in the face when she tried to grab a steering wheel; rather, he told her he never hit Doreen.

between her thumb and finger and pull her face toward him when she was speaking to him. She knew of appellant's drug use and had to lay him off for a period of time.

Dorothy Ditzel's Rebuttal testimony

The defense strenuously objected to Dorothy Ditzel's rebuttal testimony as to her telephone call from Kathleen Bondsack in late August 2000. In a hearing pursuant to Evidence Code section 402, Ditzel testified that Kathleen Bondsack called to tell her appellant and Doreen Hitchcock had just left Bondsack's home and that Doreen Hitchcock "was pretty beat up." Further, Bondsack told Ditzel that Hitchcock's face looked really bad and kept saying "Oh God. She looked terrible. And there was some blood on her shirt." According to Ditzel, Bondsack was upset and worried and wanted Ditzel to do something about the situation.

Upon questioning by the court, Ditzel was not sure of the exact date of the conversation with Bondsack but knew it was sometime at the end of August between 6 and 8 p.m. Although Bondsack was upset and asked her to check on Hitchcock, Ditzel did not do so. She did not want to get involved because of her friendship with appellant. The court found the testimony to be proper rebuttal.

Dorothy Ditzel then testified before the jury.[8] Her lengthy testimony began with her relationship with appellant. They had grown up across the street from each other; she had known him for 31 years, and he contacted her to ask her to testify in his behalf. She cast doubt on his claims of being a nationally acclaimed swimmer and receiving a swimming scholarship to USC. She testified that appellant "can be honest" but has a

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[8] After the verdicts were reached, information was revealed that appellant kept asking Dorothy Ditzel where Doreen was and told Dorothy "She needs to go visit her parents. She needs to take a trip to visit her parents." Doreen Hitchcock's parents were dead.

tendency "to embellish stories."[9] She did not think he was an honest person regarding his violent acts against Doreen and thought his stories did not seem to add up.[10]

She had never seen appellant violent until recently. She once saw appellant grab Doreen Hitchcock by the shoulders and throw her out a doorway, where she hit the ground. She could see that Doreen, who was "very frail and skinny," could do things to push appellant's buttons; but his response was anger, screaming and overreacting. He would yell and scream at Doreen, who apparently was embarrassing to him. Ditzel saw bruises on Doreen in the spring of 2000. She never saw Doreen physically attack appellant.

Toward the end of August, Ditzel received an unusual phone call from Kathleen Bondsack, whom she had met earlier in the summer at Bondsack's house in Palmdale/Little Rock. Bondsack was very upset because appellant and Doreen Hitchcock had just left her place. According to Ditzel, Bondsack "said that Doreen looked pretty bad, and she was concerned because her face looked really bad and beat up, and she had blood on her clothing." Doreen was in and out of consciousness, and Bondsack was very worried about her. Bondsack repeatedly said "Oh God."

Moreover, Bondsack told Ditzel she thought appellant did it. According to Ditzel, Bondsack assumed appellant had done it because Hitchcock told her appellant had committed prior violence against her.[11] Ditzel was also concerned but did not call 911

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[9] In discussing the victim's honesty, Ditzel related a story where a $20 bill was missing when Doreen Hitchcock spent the night. Hitchcock "found" and returned the bill, then admitted she had stolen it and apologized for her actions.

[10] For example, she discounted his story, different than his own testimony at trial, that at the drug store parking lot, Doreen Hitchcock had gotten into a vehicle with a Black man and was holding a bottle, waving good-bye to appellant. Also contrary to his testimony at trial, but corroborating the victim, Ditzel testified appellant claimed he went out to Palmdale and happened upon Doreen laying in the dirt all beat up, dirty and bruised; he added that she was purportedly beaten up by "this Black guy."

[11] Appellant's counsel raised the admissibility of this additional statement in her supplemental appellant's opening brief. Even assuming arguendo an appropriate

and was "probably afraid to get involved." Her loyalties were to appellant at that time; his wife had passed away and Ditzel had been his friend and a friend of his family for years. She talked to Bondsack since that call, but Bondsack's phone has since been disconnected.

The prosecutor used the telephone conversation in her argument to the jury.

Jury instructions

The jury was instructed in terms of CALJIC No. 2.50.02 (1999 revision), regarding evidence of other offenses involving domestic violence:

"Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence [on one or more occasions] other than that charged in the case. [¶] . . . [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit [the same or similar type] offense[s].

"If you find that the defendant had this disposition, you may, but are not required to, infer that the defendant had a disposition to commit and did commit [the same or similar type] offense[s]. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused.

"However, if you find [by a preponderance of the evidence] that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] committed the charged offense[s]. The weight and significance, if any, are for you to decide.

"[[Unless you are otherwise instructed, y]ou must not consider this evidence for any other purpose.]"

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objection to that particular statement, given the cumulative evidence that Hitchcock said appellant had hit her on multiple occasions, and given the record as a whole, we cannot find any prejudicial error in the admission of that statement.

Following 2.50.02, the court read CALJIC No. 2.50.2: "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of the issue preponderates, your finding on that issue must be against the party who has the burden of proving it.

"You should consider all of the evidence bearing upon every issue regardless of who produced it."

CONTENTIONS ON APPEAL

Appellant contends: 1. The trial court prejudicially erred by allowing in rebuttal, over defense objection, Dorothy Ditzel's hearsay statements, which were not subject to any exception. 2. The trial court denied appellant due process of law when it instructed the jury with the 1999 revision of CALJIC No. 2.50.02. 3. By urging jurors to inform on one another through CALJIC No. 17.41.1., the trial court violated appellant's Sixth and Fourteenth Amendment rights to a fair jury trial denying appellant the right to private jury deliberations and the independent judgment of each jurors, as well as infringing on the jury's power of nullification.

DISCUSSION

1. The trial court did not prejudicially err in allowing Dorothy Ditzel's hearsay statements in rebuttal.

Appellant contends that the rebuttal testimony of Dorothy Ditzel relating a telephone conversation from Kathleen Bondsack was hearsay not subject to the spontaneous declaration exception to the hearsay rule (see Evid. Code, § 1240), should have been excluded, and its admission amounted to prejudicial error.

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

The Law Revision Commission Comment to the section states: "Section 1240 is a codification of the existing exception to the hearsay rule for statements made spontaneously under the stress of excitement engendered by the event to which they relate. *Showalter v. Western Pacific R.R.*, 16 Cal.2d 460, 106 P.2d 895 (1940). See Tentative Recommendation and a study relating to the Uniform Rules of Evidence, (Article, VIII. Hearsay Evidence), 6 Cal.Law Revision Comm'n, Rep., Rec. & Studies Appendix at 465-466 (1964). The rationale of this exception is that the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness. [7 Cal.L.Rev.Comm. Reports 1 (1965)]."

"'"To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' (*People v. Poggi* (1988) 45 Cal.3d 306, 318 [246 Cal.Rptr. 886, 753 P.2d 1082]; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1289-1290 [280 Cal.Rptr. 584]; *People v. Brown* (1980) 110 Cal.App.3d 24, 37 [167 Cal.Rptr. 557].)" (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1233-1234.)

We exercise a deferential standard of review. "Whether a statement satisfies the requirements of the spontaneous declaration exception is 'largely a question of fact' and is within the discretion of the trial court. [Citations.] On appeal, the trial court's finding on this issue will not be disturbed unless those facts on which it relied are not supported by a preponderance of evidence. [Citations]." (*People v. Trimble*, *supra*, 5 Cal.App.4th 1225, 1233-1234.)

Moreover, even if the admission of the hearsay evidence was erroneous, reversal is not required unless it appears reasonably probable that a result more favorable to

appellant would have been reached absent the error. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1293; *People* v. *Watson* (1956) 46 Cal.2d 818, 836; see also *Chapman* v. *California* (1967) 386 U.S. 18 error [6th Amendment problem if no requisite indicia of reliability].)[12]

Kathleen Bondsack called Dorothy Ditzel after appellant and a beaten up Doreen Hitchcock left her residence. It was well within the trial court's exercise of discretion to admit Bondsack's horrified exclamations about the injured woman she had seen and her unexpurgated reactions to the shocking scene. Her statements fit the test of spontaneous declarations as an exception to the hearsay rule.

2. The trial court did not err in instructing the jury with the 1999 revision of CALJIC No. 2.50.02.

Appellant next contends that the pre-1999 version of CALJIC No. 2.50.02 was flawed in allowing a jury to find a defendant the perpetrator of the charged offense based on disposition alone and that the 1999 revision given in the case at bench did not cure any defect in the instruction. He argues that the jury was free to find that appellant committed the charged offense based solely on the evidence showing he committed a prior offense, thus allowing the jury to bypass "the essential dispute that appellant was not the cause of Hitchcock's injuries." Finally, he argues that *Apprendi v. New Jersey* (2001) 530 U.S. 466, 488-489, 493, 497, supports a finding that the challenged instruction violates due process in that the instruction allows an element of the offense to be proven by less than beyond a reasonable doubt.[13]

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[12] Appellant argues that the statements were particularly damaging to him because they came at the end of trial and from Dorothy Ditzel, someone who had been appellant's friend for 31 years.

[13] Respondent first argues that appellant waived any error by failing to object in the trial court. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Appellant responds that he objected to introduction of the evidence regarding prior bad acts but was "forced to acquiesce" to the instruction when the court ruled it would allow in prior bad acts Evidence Code section 1109 evidence. In his opinion, any further objections would have

We have quoted the 1999 Revision of CALJIC No. 2.50.02 given in the case at bench, above. Our Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903, 922, 924, inferentially approved a similar 1999 revised instruction, CALJIC No. 2.50.01, which instructs regarding the jury's consideration of other sex offenses, rather than the domestic violence offenses in the case at bench. Appellant attempts to distinguish *Falsetta* and relies on the opinion of Division Two of this court in *People v. Vichroy* (1999) 76 Cal.App.4th 92, 101, which held a modified version of an earlier, 1996 version of CALJIC No. 2.50.01 to be "constitutionally infirm" in that it "permitted the jury to find appellant guilty of the current charges solely because he had committed prior sexual offenses. Because we cannot assume the jury followed the constitutionally correct conflicting instruction, the judgment must be reversed." (*Ibid*.) Until and unless our Supreme Court advises to the contrary, we shall follow its inferential language in *Falsetta* that finds the language in the 1999 instruction appropriate in the consideration of other offenses evidence.[14] (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336 [upholding the 1999 version of CALJIC No. 2.50.01, despite *Vichroy*, relying on *Falsetta*].)

3. There was no prejudicial error in instructing with CALJIC No. 17.41.1.

Appellant's opening brief, challenging CALJIC No. 17.41.1, was filed prior to the decision in *People v. Engelman* (2002) 28 Cal.4th 436, 442-446, which appellant acknowledges rejects his arguments and is binding on this court. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)[15] In light of that acknowledgment, we

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been futile. (*People v. Anderson* (2001) 25 Cal.4th 543, 587) We disagree that any further objections would necessarily have been futile. In any event, we find no error in the instruction as given.

[14] The California Supreme Court heard argument on December 4, 2002, in *People v. Reliford*, S103084, on an instruction very similar to that argued as defective in the case at bench.

[15] He raises the claim again in his reply brief to preserve it for federal review.

need not decide the issue of waiver raised by the People. (See *People v. Elam* (2001) 91 Cal.App.4th 298, 310.)

DISPOSITION

The matter is remanded to permit reconsideration of the sentence imposed and amended in the minute order of March 11, 2002. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.